

EXHIBIT 5

1 UNITED STATES DISTRICT COURT

2 EASTERN DISTRICT OF VIRGINIA

3 Alexandria Division

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6 RUSSELL BRAMMER,

7 Plaintiff,

8 vs.

9 VIOLENT HUES PRODUCTIONS, LLC,

10 Defendant.

11 - - - - - +

12 Alexandria, Virginia

13 Wednesday, April 4, 2018

14

15 Deposition of RUSSELL BRAMMER, a witness

16 herein, called for examination by counsel for

17 Defendant in the above-entitled matter, pursuant to

18 agreement, the witness being duly sworn by MICHELE E.

19 EDDY, RPR, CRR, a Notary Public in and for the

20 Commonwealth of Virginia, taken at the law offices of

21 Attorney Craig C. Reilly, 111 Oronoco Street,

22 Alexandria, Virginia, at 9:01 a.m.

10:49:16 1 A Yes.

10:49:16 2 Q -- at the most? Okay.

10:49:17 3 Do you recall what you talked about with

10:49:18 4 Ms. Haas on that phone call?

10:49:23 5 A Yeah. I informed her that they had been

10:49:29 6 using my photo. She apologized and said that they

10:49:33 7 were in the wrong and asked me to let her know

10:49:40 8 where it was being used. I don't remember if that

10:49:49 9 was when she asked for a license or for -- I don't

10:49:58 10 remember if that was that conversation or if it

10:50:01 11 was in an email, but that was the gist of it.

10:50:05 12 Q Okay. And then your follow-up here then

10:50:07 13 is -- is laying out the specific places where you

10:50:11 14 had found that her company had used the photo.

10:50:15 15 Correct?

10:50:15 16 A Yes.

10:50:21 17 Q How did you -- how did you find these

10:50:24 18 potentially infringing uses of your photo?

10:50:29 19 A I don't remember if -- I don't remember.

10:50:35 20 Q Did you find it through Pixsy? Were you

10:50:38 21 using Pixsy at that time?

10:50:40 22 MR. DEAL: Objection. It's been asked

11:09:28 1 A Wait, \$1,800?

11:09:29 2 Q So there was -- the six websites had

11:09:31 3 used Adams Morgan at Night, and one had also used

11:09:34 4 your other photo, which was the Adams Morgan at

11:09:36 5 Sunset, I believe. You can read through the whole

11:09:40 6 email if it makes it more clear. I'm probably

11:09:43 7 jumping around too much, which is why I'm causing

11:09:46 8 trouble.

11:09:56 9 A I see \$1,200 for six months plus \$200

11:10:06 10 for the Sunset photo plus the \$600 makes \$2,000.

11:10:12 11 Q Makes the 2,000.

11:10:13 12 A Yes.

11:10:13 13 Q That's what I was trying to do, is get a

11:10:16 14 breakdown of how we got to that \$2,000.

11:10:18 15 So the prior usage of your photos you

11:10:21 16 offered for \$2,000. And then the next line, where

11:10:23 17 it says, "Plus," you say \$1,400 for the next six

11:10:27 18 months of use on the web, or if they want to use

11:10:29 19 it on the web for another year, it's 1,750.

11:10:31 20 Right?

11:10:33 21 A Yes, that's what it says.

11:10:37 22 Q So of the \$2,000 for the past usage,

11:10:41 1 \$800 of that is attributable to Bernstein's use of
11:10:45 2 the Adams Morgan at Night photo, right? So \$1,200
11:10:50 3 for web use and then the \$600 for the print.

11:10:53 4 A Yes.

11:10:56 5 Q And then the licensing going forward of
11:11:00 6 the \$1,400 for the next six months, \$1,200 of that
11:11:05 7 would be for Adams Morgan at Night and then \$200
11:11:08 8 for the Sunset photo. Right?

11:11:10 9 A Yes, I believe that's accurate.

11:11:12 10 Q And of the 1,750 for the next year, it
11:11:16 11 would be 1,500 for Adams Morgan at Night and 250
11:11:20 12 for the Sunset photo. Right?

11:11:22 13 A Yes.

11:11:24 14 Q So based on your totals to Ms. Haas, if
11:11:36 15 Bernstein wanted to use the photos -- all the
11:11:39 16 photos for a year -- actually, I'll do this
11:11:43 17 differently. Strike that.

11:11:45 18 So if we take the \$1,800 for past usage
11:11:49 19 for Adams Morgan at Night and add that to the
11:11:51 20 \$1,500 for the next year of web use, that would be
11:11:57 21 \$3,300. Right?

11:12:01 22 A I'm sorry, say that again.

11:12:03 1 Q Sorry. No, it's my fault. I should be
11:12:06 2 more clear.
11:12:07 3 So if we take -- I just want to talk
11:12:10 4 about the numbers attributable to the Adams Morgan
11:12:12 5 at Night photo, which is why I think it's kind of
11:12:15 6 hard to pull it out of the totals. So of the
11:12:17 7 prior usage, we agree that \$1,800 of that was for
11:12:20 8 the Adams Morgan at Night. Correct?
11:12:24 9 A Yeah, 1,200, yeah.
11:12:27 10 Q And then if we go down to the 1,750 for
11:12:29 11 the next year, 1,500 of that is attributable to
11:12:33 12 the usage of Adams Morgan at Night. Right?
11:12:36 13 A Yes.
11:12:37 14 Q So your -- essentially your offer to
11:12:40 15 Bernstein for payment for prior usage as well as
11:12:43 16 payment for another year of usage would be a total
11:12:48 17 of \$3,300 for the Adams Morgan at Night photo
11:12:50 18 specifically. Right?
11:13:03 19 A Yeah. I'm going to -- yeah, without
11:13:07 20 getting a calculator out, yeah.
11:13:10 21 Q I could give you one if you want, but
11:13:12 22 it's 1,500 plus 1,800?

11:13:15 1 A I don't think you're trying to trick me.

11:13:24 2 Q You essentially close your email by

11:13:25 3 saying to Ms. Haas, let me know what the next

11:13:29 4 steps you want to take. I can send you an invoice

11:13:32 5 if you want. Is that -- I know I'm not saying it

11:13:34 6 word for word, but that's essentially your

11:13:36 7 closing. Right?

11:13:37 8 A Yes.

11:13:43 9 Q Now, if you go to the email from

11:13:45 10 Ms. Haas that comes on Tuesday, April 5th, at

11:13:52 11 1:12 p.m., she writes, "Russell" -- whoops, she

11:13:56 12 doesn't say your name, I'm sorry. Strike that.

11:13:59 13 Ms. Haas' email to you Tuesday, April

11:14:01 14 5th, at 1:12 p.m., says, "Thank you so much for

11:14:05 15 the email. What we propose is we will pay you a

11:14:08 16 one-time payment of \$2,500 to use the two images

11:14:12 17 on our websites as well as the printed image

11:14:16 18 inside the building and no time restriction of

11:14:19 19 use."

11:14:19 20 Do you see that?

11:14:20 21 A Yes.

11:14:24 22 Q She then says, "If this doesn't sound

11:14:27 1 agreeable, we are more than willing to remove the
11:14:29 2 images from our Internet listings now that you
11:14:31 3 have alerted us, as well as the print. Again, we
11:14:34 4 apologize and hope you accept our counteroffer
11:14:38 5 acceptable."

11:14:42 6 A That's what it says.

11:14:44 7 Q So, essentially, what Ms. Haas is saying
11:14:47 8 here is that for a one-time payment of \$2,500,
11:14:49 9 they want to settle up any of the prior unlicensed
11:14:55 10 usage and be able to use your photos going forward
11:14:58 11 on their websites --

11:14:59 12 A Correct.

11:14:59 13 Q -- as well as the print --

11:15:00 14 A Yes.

11:15:00 15 Q -- in The Melwood building. Right?

11:15:02 16 A Yes.

11:15:13 17 Q Would you -- would you consider this to
11:15:15 18 be a settlement with Ms. Haas for the prior use of
11:15:18 19 your -- prior unlicensed use of your photo?

11:15:21 20 A Yes.

11:15:25 21 Q And you ultimately accepted Ms. Haas'
11:15:28 22 counteroffer. Right? That's your email on the

11:27:54 1 website was using the Adams Morgan at Night photo

11:27:57 2 which is the same photo at issue in this case.

11:27:59 3 Right?

11:28:00 4 A Yes.

11:28:01 5 Q And then Barbara writes in the next

11:28:03 6 paragraph -- I'm skipping to the third sentence.

11:28:04 7 She writes, "The above license fee should

11:28:07 8 therefore be considered a starting point for

11:28:09 9 negotiations, and you will receive confirmation of

11:28:12 10 your royalties once the license fee has been

11:28:15 11 paid."

11:28:16 12 Did I read that correctly?

11:28:17 13 A Yes.

11:28:18 14 Q And so fair to say that what Barbara is

11:28:22 15 saying here is this is essentially Pixsy's initial

11:28:25 16 offer to Spot Hype. It may not ultimately come

11:28:29 17 out at 750, but that's where the negotiations are

11:28:32 18 starting. Is that fair?

11:28:33 19 A That would be a fair way to read that, I

11:28:34 20 think.

11:28:37 21 Q Would you consider these to be a

11:28:38 22 settlement negotiation between Pixsy working on

11:28:41 1 your behalf and spothype.com?

11:28:49 2 A Yes.

11:29:00 3 Q One quick thing.

11:29:01 4 So the second page of this, looks like

11:29:05 5 pretty soon after you get this email from Pixsy,

11:29:06 6 you forward it on to Laura Cassil, I believe is

11:29:11 7 how you pronounce her last name. That's your

11:29:13 8 wife. Right?

11:29:14 9 A Yes, that's my wife.

11:29:15 10 Q What was your rationale for forwarding

11:29:16 11 it on to her?

11:29:21 12 A I like to keep her updated on things

11:29:25 13 that are happening in my life. She's my wife.

11:29:29 14 Q So just to keep her in the loop of what

11:29:30 15 was going on.

11:29:32 16 A Yes.

11:29:41 17 MR. DEAL: Let me take a break for just

11:29:42 18 one second.

11:29:42 19 MR. WEIR: Okay.

11:29:44 20 THE VIDEOGRAPHER: We are going off

11:29:44 21 record at 11:29.

11:29:47 22 (A brief recess was taken.)

11:37:36 1 THE VIDEOGRAPHER: We are on record at

11:37:37 2 11:37.

11:37:39 3 (DX Exhibit 14 was marked for

11:37:39 4 identification and attached to the deposition

11:37:39 5 transcript.)

11:37:39 6 BY MR. WEIR:

11:37:52 7 Q I'm handing you a document that I have

11:37:54 8 marked as DX 14. And this is a follow-up email

11:38:06 9 from the Pixsy Case Management Team on August 3rd,

11:38:10 10 2017. Correct?

11:38:16 11 A Yes.

11:38:16 12 Q It is following up on the prior

11:38:18 13 communication where they had told you that they

11:38:20 14 had reached out to Spot Hype LLC, and now they are

11:38:23 15 informing you that Spot Hype LLC had paid for the

11:38:26 16 use of the photo. Correct?

11:38:29 17 A Yes.

11:38:31 18 Q It says that "The royalty you have

11:38:33 19 earned from this case is \$375." Is that correct?

11:38:43 20 A Yes.

11:38:43 21 Q Based on your agreement with Pixsy, is

11:38:45 22 that 50 percent of what Spot Hype paid?

11:38:48 1 A Yes.

11:38:52 2 Q Do you know what the details were of any
11:38:54 3 license that was granted to Spot Hype?

11:38:59 4 A I don't think so.

11:39:02 5 Q Do you know whether a license was
11:39:04 6 granted at all or whether this was just settling
11:39:06 7 up for prior unlicensed use?

11:39:10 8 A I don't know.

11:39:15 9 Q Were you included or privy to any
11:39:17 10 back-and-forth negotiations or discussions between
11:39:19 11 Pixsy and Spot Hype that ultimately resulted in
11:39:24 12 the settlement that is reflected in this email?

11:39:27 13 A I don't believe so.

11:39:31 14 Q So you wouldn't know whether there was
11:39:32 15 any back-and-forth negotiations or anything of the
11:39:34 16 like?

11:39:35 17 A I don't know.

11:39:37 18 Q But you aren't aware of them
11:39:38 19 specifically. Correct?

11:39:39 20 A I'm not aware of any, yes.

11:39:49 21 Q And you aren't aware of whether Pixsy
11:39:51 22 granted Spot Hype a going-forward license for any